



Report to the Auburn City Council

Action Item
Agenda Item No. **4**

[Signature]
City Manager's Approval

To: Honorable Mayor and City Council Members
From: Robert Richardson, City Manager
Andy Heath, Administrative Services Director
Date: October 24, 2011
Subject: Resolution Regarding Appeal By Four Members of Office and Administrative Support Bargaining Unit on Petition to Decertify

The Issue

Shall the City Council approve a resolution that (a) grants the appeal by four members of the Office and Administrative Support Bargaining Unit of the tie vote that resulted from State Mediation and Conciliation Service's conduct of an election on those employees' petition to decertify the International Union of Operating Engineers, Local 39 as the exclusively recognized bargaining agent of this unit; and (b) declares the unit to be unrepresented and open for new petitions for recognition of an exclusive bargaining agent?

Conclusions and Recommendation

Pursuant to the Council's direction at the meeting on October 10, 2011, to prepare a resolution addressing items (a) and (b) above, this matter is placed on your consent calendar for approval. Mr. Hanley should not participate in this action unless he has had time to review the evidence submitted on October 10th and to review the tape of the hearing.

Alternatives

The Council may refuse to approve the resolution, request changes to the resolution, or give other appropriate direction on this subject as it sees fit. The options identified in the staff report for your October 10th meeting also remain available to you.

Discussion

On October 10, 2011, the Council voted 4-0 in Mr. Hanley's absence to grant the appeal by four members of the Office and Administrative Support Bargaining Unit on their petition to decertify Local 39 as the exclusively recognized bargaining agent of the unit. The Council further determined that, had an invalid vote not been counted, Local 39 would have been decertified by a seven to six vote in the September 19th election and concluded that the result of the election is that Local 39 was in fact decertified. The Council directed staff to draft a resolution and place it on the Council's consent calendar for October 24, 2011. The hearing on this appeal is closed and

no further evidence can be taken. However, public comment under the Brown Act is permitted and the Council's action on this matter is not final until the resolution is adopted.

The City Attorney and I will be present to assist your discussion of this matter on October 24th. If either of us can provide further information to assist your review of this resolution in the meantime, please let us know.

Attachments: Draft Resolution
October 10th staff report (w/o attachments)

RESOLUTION NO. _____

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF AUBURN
GRANTING THE APPEAL BY OFFICE AND ADMINISTRATIVE
SUPPORT BARGAINING UNIT EMPLOYEES WITH RESPECT TO THE
ELECTION ON THEIR PETITION TO DECERTIFY INTERNATIONAL
UNION OF OPERATING ENGINEERS, LOCAL 39, AND DECLARING
THE BARGAINING UNIT TO BE UNREPRESENTED**

WHEREAS, the International Union of Operating Engineers, Local 39 ("Local 39") was the recognized employee organization for the Office and Administrative Support bargaining unit; and

WHEREAS, four employees ("the proponents") in the Office and Administrative Support Bargaining Unit ("the bargaining unit") petitioned for an election to decertify Local 39 on the grounds that it no longer enjoyed majority support from the employees in the bargaining unit; and

WHEREAS, the State Mediation and Conciliation Service ("SMCS") facilitated an election on September 19, 2011 to determine whether City employees desired to continue to be represented by Local 39; and

WHEREAS, the result of the September 19, 2011 election was a seven to seven tie; and

WHEREAS, SMCS allowed a former employee, Linda Bauer, to vote in the September 19, 2011 election despite the fact that Ms. Bauer was not employed by the City on the record date by which eligibility to vote was required to be established; and

WHEREAS, on September 28, 2011, the proponents appealed the election result, questioning the seven-to-seven result on the basis that only thirteen employees met the eligibility criteria to vote in the election and arguing the tie vote demonstrated a lack of majority support for Local 39's continuation as the recognized employee organization for this bargaining unit ("the appeal"); and

WHEREAS, the proponents submitted with their appeal a declaration bearing the apparently genuine signatures of seven of thirteen current unit members affirming that they voted "no" in the election, Linda Bauer is not among the signatures, and no one has suggested that the signatures are not genuine and were not voluntarily provided to the proponents;

WHEREAS, Local 39 contends that it can only be displaced as the exclusively recognized employee organization by majority vote, that City Council resolution of the appeal is improper, that Ms. Bauer's vote was proper because her layoff was only temporary; and that the affidavit showing how seven employees voted may not be considered without violating election secrecy and complains that the City funded the

September 19th election without requiring Local 39 to pay its share of that cost, as the City's Employer-Employee Relations Policy (EERP) requires; and

WHEREAS, Local 39's contentions are addressed in the staff report presented at the October 10th hearing on this appeal and are further addressed in this Resolution; and

WHEREAS, the City Council has the authority under the EERP to consider and finally resolve appeals of determinations regarding decertification petitions; and

WHEREAS, the City has an interest in ensuring its employees remain free to decide for themselves whether to be exclusively represented by a recognized employee organization, and by whom; and

WHEREAS, it is clear from the evidence presented that the will of the majority of the bargaining unit is to decertify Local 39, and there need be no new election to decide the question.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF AUBURN, CALIFORNIA, DOES RESOLVE, DECLARE, DETERMINE AND ORDER AS FOLLOWS:

SECTION 1. The City Council finds and determines that each of the findings set forth above is true and correct.

SECTION 2. Pursuant to Article II, Section 10.0 of the EERP, the City Council has authority to consider appeals submitted to it thereunder, the Public Employment Relations Board has disclaimed jurisdiction over this dispute, and failure to entertain this appeal would leave appellants with no administrative remedy to an apparent violation of their rights.

SECTION 3. On the basis of the findings stated in this Resolution and the evidence in the record of its October 10, 2011 hearing, the City Council hereby GRANTS the appeal.

SECTION 4. The City Council hereby finds that Linda Bauer did not meet the eligibility criteria to participate in the September 19th election set out in Article II, Section 6.0(B) of the EERP because her employment with the City was permanently terminated by lay off effective July 5, 2011 and she has applied for unemployment benefits, affirming she is not employed by the City.

SECTION 5. The affidavit submitted with the appeal demonstrates that seven of the thirteen current members of the bargaining unit eligible to vote do not support Local 39's continuation as the exclusive bargaining agent of this unit. Although employees are entitled to ballot secrecy, that right exists for the benefit of employees and they are free to waive that secrecy if they choose. No suggestion has been made that the seven signatures shown on that affidavit are not genuine and voluntary. Moreover, the effect

of granting the appeal and decertifying Local 39 will be to establish the bargaining unit as unrepresented, allowing Local 39 and any other qualified employee organization to demonstrate sufficient support by unit members to justify a new election to establish an exclusive bargaining agent for this unit. Accordingly, if any of these seven employees regrets his or her vote to decertify Local 39, the matter can be expeditiously corrected by a new certification petition.

SECTION 6. The City Council hereby declares that the result of the September 19, 2011 election was seven votes for no bargaining agent and six votes to retain Local 39 as the exclusive bargaining agent of this unit. Accordingly, the bargaining unit is unrepresented and open for new petitions for recognition of an exclusive bargaining agent pursuant to Article II of the EERP.

SECTION 7. Pursuant to Section 10.0(C) of Article II of the EERP, this decision is final and binding. The City hereby provides notice that the time within which judicial review of this decision must be sought is governed by section 1094.6 of the California Code of Civil Procedure.

SECTION 8. This resolution is effective immediately.

SECTION 9. The City Clerk shall certify to the passage and adoption of this Resolution and enter it into the book of original Resolutions. The Employee Relations Officer shall provide a copy of this Resolution to the proponents and Local 39 by personal delivery or U.S. Mail, certified, with return receipt requested and shall implement it.

PASSED, APPROVED AND ADOPTED this 24th day of OCTOBER 2011.

William Kirby, M.D., Mayor

ATTEST:

Joseph G. R. Labrie, City Clerk

APPROVED AS TO FORM:

Michael G. Colantuono, City Attorney

I, Joseph G.R. Labrie, City Clerk of the City of Auburn hereby certify that the foregoing resolution was duly passed at a regular meeting of the City Council of the City of Auburn held on October 24th, 2011, by the following vote on roll call:

Ayes:

Noes:

Absent:

Abstain:

Joseph G.R. Labrie, City Clerk

DRAFT



Report to the Auburn City Council

ATTACHMENT

City Manager's Approval

To: Honorable Mayor and City Council Members
From: Robert Richardson, City Manager
Andy Heath, Administrative Services Director
Date: October 10, 2011
Subject: Appeal from Result of Election on Petition to Decertify Exclusively Recognized Employee Organization for Office and Administrative Support Bargaining Unit

The Issue

Shall the City Council grant the appeal by four members of the Office and Administrative Support Bargaining Unit of the tie vote that resulted from State Mediation and Conciliation Service's conduct of an election on those employees' petition to decertify the International Union of Operating Engineers, Local 39 as the exclusively recognized bargaining agent of this unit? If so, what remedy should the Council award?

Recommended Action

City management recommends the City Council grant the appeal and order a new election in compliance with Article II, Section 6.0 (B) of the City's Employer Employee Relations Policy, which limits the vote to those employed by the City in the 13 positions within this bargaining unit as of 15 days before the date set for the election.

Discussion and Recommendation

In early August 2011, employees in the Office and Administrative Support Bargaining Unit petitioned to decertify Local 39 as the exclusively recognized bargaining agent for the unit on the grounds that it no longer enjoyed majority support. Pursuant to an agreement between City management and Local 39, the State Mediation and Conciliation Service ("SMCS") conducted a mail-ballot election on September 19, 2011 to determine whether a majority of the employees in the unit wish to continue to be represented by Local 39. That agreement specified that the SMCS election supervisor had the duty to determine the eligibility of a voter prior to opening his or her ballot. Eligibility criteria under Section 6.0(B) of the City's Employer Employee Relations Policy ("EERP") included: (a) voters had to be employed in this unit during the payroll period ending July 31, 2011; and (b) voters must still be employed on the date they cast their ballots in the election.

Fourteen (14) votes were cast in the election and the election supervisor for the SMCS determined to allow Linda Bauer, a former City employee, to vote. However, Ms. Bauer had

been laid off permanently by the City effective July 5, 2011. As such, she did not meet the eligibility criteria to vote in the decertification election. The election agreement provides that decisions of SMCS on eligibility to vote are binding on Local 39 and the City. However, the petitioners and other employees in the bargaining unit were not parties to that agreement and are not bound by it and it appears SMCS decision to allow Ms. Bauer to vote violated those employees' rights to determine whether and by whom to be represented in their employment relations with the City. City management, of course, has no interest in this matter – whether and by whom employees are represented is a question for the employees themselves to determine in a democratic way under the Employer Employee Relations Policy.

The decertification election resulted in a seven-to-seven tie. Local 39 asserts that it cannot be displaced as the exclusively recognized employee organization except by majority vote (and therefore cannot be displaced by a tie vote). However, the appellants argue that only thirteen (13) employees met the eligibility criteria on the date of the election. The appellants further assert that 7 employees other than Ms. Bauer cast votes for “no representation,” and therefore Local 39 lacks majority support. They have provided an affidavit signed by seven employees affirming that each voted “no”. Moreover, it can be argued that even a 7-7 tie demonstrates a lack of majority support, as a majority of 14 is 8.

In a letter dated October 6th, attached to this report as Attachment F, Local 39 makes several responses to the appeal. First, they allege allowing an appeal is procedurally improper because it allows the City Council to resolve what should be a dispute internal to the bargaining unit. However, City management staff contacted the Public Employment Relations Board (PERB), which confirmed that it can not allow an appeal of this matter because the City's EERP controls, rather than PERB's rules which apply only in the absence of local rules. If the City Council refused to consider this appeal, no remedy would be available to City employees for what is alleged to be an error by SMCS depriving employees of their right to determine whether to continue to be represented by Local 39 and to continue to be subject to a duty to pay dues in support of that organization. Moreover, the City met and conferred with Local 39 and all its bargaining units last year when the EERP was adopted and no allegation was made at that time that the appeal rights provided by Section 10 of Article 2 were improper. Accordingly, management staff recommends the Council entertain the appeal.

Second, Local 39 claims that the Meyers, Milius Brown Act prevents a recognized bargaining agent from being displaced except “by a majority vote of the employees.” This amounts to an argument that Local 39 is legally entitled to win ties. Be that as it may, the question remains whether one of the votes apparently cast to maintain Local 39 as the exclusive bargaining agent for this unit may be counted. Moreover, the City's own rules and provisions of Meyers, Milius Brown not cited by Local 39 require an exclusive bargaining agent to demonstrate majority support which a tie vote does not do. In any event, it is not apparent that there was a valid tie vote, given that 14 votes were cast in a unit with just 13 eligible voters.

Third, Local 39 claims that Ms. Bauer was properly permitted to vote because her layoff was temporary and she remains a member of the bargaining unit. However, the layoff was not temporary. The City has eliminated all administrative assistant positions throughout the organization – Ms. Bauer's was the last to go – and has no intention of reinstating those positions. Moreover, the language of Section 6.0 of Article II states:

Employees entitled to vote in such election shall be those persons employed in regular permanent positions within the Appropriate Unit during the pay period immediately prior to the date which ended at least fifteen (15) days before the date the election commences, **including those who did not work during such period because of illness, vacation or other authorized leaves of absence**, and who are employed by the City in the same Appropriate Unit on the date the election commences. EERP, Art. II, section 6.0(B) (emphasis added).

Whether or not Ms. Bauer was temporarily or permanently laid off, she did not work in the relevant pay period for reasons other than “illness, vacation or other authorized leave of absence.” A permanent (or temporary) layoff is not “an authorized leave of absence.” City management concludes Ms. Bauer was ineligible to vote but that remains an issue for resolution by the City Council after considering the testimony and other evidence submitted at the hearing. Moreover, Ms. Bauer has applied for, and will likely receive, unemployment benefits – further evidence that she does not view herself as “employed by the City” as the EERP requires.

Fourth, Local 39 urges the Council to disregard the affidavit provided by the appellants demonstrating that 7 current employees voted against Local 39’s continued representation of this unit because to do so violates the requirement that elections be secret. The ballot secrecy requirement is for the benefit of employees and they can waive that right if they choose. Accordingly, you are entitled to consider the affidavit. On the other hand, management staff do not recommend that you accept the affidavit at face value and declare the proponents of the petition to decertify Local 39 as victors (although the Council may ignore that recommendation and determine otherwise, as noted below). Rather, management staff recommends only that you determine whether Ms. Bauer was eligible to vote and, if not, whether the appropriate remedy is a new election in which secret ballots will be cast.

Fifth, Local 39 threatens to bring an unfair labor practices charge before PERB if the City Council grants the appeal. It can be expected that the appellants will bring such a charge if the City Council denies the appeal. Accordingly, management staff recommends you decide this appeal on its merits, leaving the stakeholders to whatever remedies they deem appropriate after you do so.

Lastly, Local 39 complains that the City agreed to bear the entire cost of the decertification election rather than insist Local 39 pay half. It views this concession on the City’s part as evidence that the City lacks impartiality in this matter. Management staff has two comments on this point – first, Local 39 mistates what occurred. Local 39 flatly refused to pay its share of the election costs, leaving the City two options – pay for the election itself or allow Local 39 to unilaterally veto employee’s rights to determine whether Local 39 should continue to take their dues and exclusively represent them in the negotiations with the City. Even if the City’s decision to pay for the election could be viewed as a concession, Local 39 did not object to that concession when it was made. Second, management reiterates that the City has no dog in this fight – while we owe our employees a fair election under the law and the EERP, the outcome of that election is entirely to the fair and free choice of the affected employees. The City will honor whatever outcome may result. Finally, it is not management staff who will decide this matter, but the Council. Accordingly, any administrative decision not to challenge Local 39’s refusal to

honor its obligations under the EERP to fund half the election cost, which it might have done from dues received from its Auburn members, ought not to impair the Council's ability to be a fair and impartial arbiter of a dispute among its employees. Again, the logic of Local 39's arguments is that by refusing to fund the election it could veto it either before or after the fact. This inconsistent argumentation is not evidence of good faith and cannot be permitted to deny the appellants any remedy at all, given the City's obligations under the Meyers Milias Brown Act and its EERP. Someone must attempt to resolve this dispute and PERB has indicated it has no authority to do so.

In sum, the legal effect of a tie in a decertification election is uncertain and confidence in the result is further undermined by the SMCS's apparent error in allowing Ms. Bauer to vote. More importantly, the City's ultimate goal is to ensure that City employees may freely determine whether they should be exclusively represented, and by whom, in a fair and democratic process that complies with law and the City's Employer Employee Relations Policy. The City otherwise has no stake in the questions presented by the appeal.

Accordingly, City management recommends that you grant the appeal and order a new election limited to eligible voters. To facilitate prompt resolution of this matter, attached herein is a resolution by which you may do so. Whether to do so is, of course, for the City Council to decide after conducting the hearing.

Fiscal Implications

The legal services and staff time to prepare this report resolution are budgeted. Adoption of the resolution will not have ongoing financial consequences, particularly because the EERP states that any decision by the City Council determining the substance of a dispute is final and binding.

Alternatives

The Council has at least these alternatives to the recommendation action:

1. Grant the appeal, determining that 7 of 13 eligible employees voted against continued representation by Local 39, and declare this unit to be unrepresented, inviting any party to seek recognition by demonstrating majority support of current unit members.
2. Deny the appeal, determining that Local 39 is the properly recognized exclusive bargaining agent and protected from a further decertification petition for 12 months.
3. Refer the appeal to a hearing officer to prepare findings of fact and conclusions of law for your review.

Other options may occur to the Council as well and the stakeholders may suggest further alternatives in writing or orally at the hearing. On balance, staff recommends against the first two options noted here because they can be viewed to intrude too deeply into the democratic process of employee self-determination. Staff recommends against the third option noted here because the attendant expense and delay seems unwarranted.

Attachments

Attached are relevant portions of the Employer Employee Relations Policy; the election agreement among the City, Local 39, and the State Mediation and Conciliation Service; the appeal materials submitted by the proponents of the decertification petition; my October 5, 2011 letter to the parties to this appeal informing them of your hearing, the affidavit of 7 employees affirming that they voted against continued representation by Local 39; and Local 39's October 6th letter. My October 5th letter invites the parties to submit any further materials they wish you to review by 11:00 AM on Friday, October 7, 2011 so the City Clerk's office can forward those materials to you and make them available to the public. If late-filed materials are received, the City Clerk's office will circulate those as well. Moreover, the stakeholders (and members of the public) are free to comment orally at your hearing on this appeal.

The City Attorney and I will be present to assist your discussion of this matter on October 10th. If either of us can provide further information to assist your review of this appeal in the meantime, please let us know.

Attachment A - Article II of Employer Employee Relations Policy

Attachment B - Election Agreement dated September 19, 2011

Attachment C - September 28, 2011 appeal, with attachments

Attachment D - October 5, 2011 notice of hearing

Attachment E - Affidavit of employees voting "no representation"

Attachment F - October 6, 2011 letter from Chuck Thiel, Local 39

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